Supreme Court, U.S.
FILED
DEC 28 2007
OFFICE OF THE CLERK

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No. 07-560

IN THE

Supreme Court of the United States

LOWE EXCAVATING CO., PETITIONER

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REPLY BRIEF

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COUNTERSTATEMENT OF FACTS

Local 150's presentation of facts is modified below:

1. Lowe had met with representatives of Local 150 immediately before the union commenced its malicious libels and provided them with its payroll records:

> Darling testified that, during a meeting with Marshall Lowe in December 1987 or January 1988, Marshall provided several documents, including Lowe's 401(k) pension plan, profit sharing plan, and payroll information.

Lowe Excavating Co. v. Operating Engrs., Local 150, 327 Ill. App.3d 711, 765 N.E.2d 195, 26 (Ill. App. 2002).

Marshall Lowe told Business Agent Colin Darling and Union Organizer Robert Paddock at that meeting that his company was paying area standards. R-1172.

2. The Union's *post hoc* audit (represented at Resp. 3) was not conducted to prove its statements but to reveal whether Lowe's wages and benefits were the same as the union contract rates. The undisputed testimony was that Lowe paid prevailing wages and superior benefits. The Illinois courts found:

> The Union's only evidence that arguably challenged this testimony established only that Lowe's benefits did not match the Union's point by point and that its wage raises became effective 10 months after the Union's. Although there were differences in the benefits packages, the Union presented no evidence that Lowe did not pay prevailing wages as a whole as required by federal law to its employees. Local 150 never conducted an audit to undermine the unanimous

testimony that Lowe paid prevailing wages and benefits.

Lowe Excavating Co., 765 N.E.2d at 32.

Local 150 does not deny that Lowe paid the government established prevailing wages and benefits in February and September 1988 at Ballashire Hall.

3. Local 150 claims its defamatory picketing of Kinney Construction set forth in the "affidavit of *subsequent* conduct" was not considered by the Courts below. Resp. 19 n.2. The evidence of similar defamatory conduct, however, is firmly established in the record for purposes of review by these courts. On November 21, 2003, the trial court issued an Order ruling that Plaintiff's "Offer of Proof is part of the 'record.'" C001638.

COUNTER ARGUMENT

I.
THE UNION'S CHALLENGE TO THE EXISTENCE OF THE SMALL DAMAGE CASE EXCEPTION IS A SIGNIFICANT MATTER OF PUBLIC IMPORTANCE AND BASIS FOR GRANTING REVIEW

Lowe demonstrated in its Petition that this Court has repeatedly declined to apply its numerical ratio standard to cases involving small damages beginning with *BMW of No. America v. Gore*, 517 U.S. 559, 582 (1996). In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), this Court repeated, quoting *Gore* that: "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"

The Union argues that "THERE IS NO SMALL DAMAGE CASE EXCEPTION" without explaining why it should be excused from the punitive damage consequences of their malicious libel after protracting the litigation with Lowe for twenty years. Resp. at 23. It further suggests that "[a]t no point has this Court recognized a 'small damage' exception to its constitutional analysis of punitive damage awards." *Id.* No case is cited to support its contention.

If this substantial question of law does not exist as the Union alleges, it must be resolved by this Court as all other courts are operating on the same erroneous assumption that the exception does exist. Local 150 does not dispute the application of disproportionate ratios in the cases set forth on page 20 of the Petition.

Even the Supreme Court of Illinois stated: "We recognize that low compensatory damages awards may support higher ratios where a particularly egregious act has resulted in a small amount of economic damage, or where an injury is hard to detect and the harm is difficult to determine," 35a, citing to *Gore*, *supra*, and *State Farm*, *supra*.

Without the ability to provide for punitive damages in small damage cases, the wrongdoer is given no incentive to change its behavior or to recognize and rectify the egregious activity it engaged in.

As illustrated in the Union's Counter-Statement of Facts, the acknowledged wrongdoer here continues to claim it did nothing wrong and that the 90% reduction in punitive damages ordered by the Supreme Court of Illinois has had no deterrent effect on it at all: "the Company received all the actual damages which it proved, it is not up to the courts to make up for Lowe's bad judgment through an enhanced punitive damages award." Resp. at 20-21, when it was the Union's

malicious libel that led to the judgment awarded against it.

A very high level of public importance rides on this issue, for if there is no exception for small damage cases or no exception where dignitary harm is involved, then the historical premise for choosing access to the judicial system to resolve disputes over "violent retaliation for wrongful injury," *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003), may be at risk.

Local 150 does not deny a conflict with the Seventh Circuit. Br. at 9. The conflict between the two courts is shown by Illinois Supreme Court Justice Garman in dissent: "While the majority identifies these factors, it does not appear to actually utilize them in concluding that a punitive damages award of $325,000, at a ratio of approximately 75 to 1, is unconstitutionally excessive, while an award of $50,000, at a ratio of 11 to 1, is reasonable and constitutional. " 44a.

Since the Supreme Court of Illinois addressed and relied solely on its interpretation of the federal constitutional due process question in the award of punitive damages here, this Court has the final say on whether the due process clause has been applied and construed properly. Conflict with a federal circuit court of appeals is an "established reason for the grant of certiorari." Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 240 (8th ed. 2002).

1. *Error Applying Constitutional Precedent.*

The first error of the Illinois Supreme Court in citing to *BMW v. Gore* and *State Farm v. Campbell*, had it looking not to see whether the amount of punitive damages was excessive or inconsistent with awards in Illinois, but in reliance on cases dealing with negligence standards and other civil torts from multiple

states with diverse and different legal theories and not matching the same high burden of proof Lowe met here.[1]

Second, while recognizing that the Seventh Circuit interpreted this Court's decisions and the federal Constitution in *Mathias, supra,* to find that certain "considerations" should be taken into account when awarding punitive damages, 38a, the Supreme Court of Illinois chose not to or refused to apply these considerations at all.[2]

In *Cooper vs. Casey*, 97 F.3d 914, 919 (7th Cir. 1996-), the court recognized the importance of the very

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[1]Local 150 has no license to maliciously libel a company at will under *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966). If anything, the number of these cases continue to mount. *See e.g.*, "Union defamed builder, jury finds Carpenters ordered to pay $2.35 million," *Chicago Tribune* (Sept. 22, 2006); "UNITE Here hit with $17.2 million decision in Sutter defamation suit," *Sacramento Bee* (July 22,2006). Libel cases are proceeding in both federal and state court in Illinois which will now be determined by differing constitutional standards unless this Petition is granted. *E.g., Carpenters v. Maki Constr. Co.*, No. 2-07-0173 (Ill. App. 2d Dist.), *Orgler Homes, Inc. v. Carpenters*, No. 06-50097 (N.D. Ill.).

[2]What "may be awesome punishment for an impecunious individual defendant ... [may be] wholly insufficient to influence the behavior of a prosperous corporation." *Continental Trend,* 101 F.3d at 641; *see Campbell*, 538 U.S. at 427-28, 123 S.Ct. 1513 (observing that consideration of defendant's wealth is not "unlawful or inappropriate" so long as it is not used to "make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct") (citation omitted). *CGB Occupational Therapy, Inc. v. RHA Health Services, Inc.*, 499 F.3d 184, 193 (3d Cir. 2007).

considerations the Illinois Supreme Court failed to apply:

> The defendants complain that the award of punitive damages was excessive because it was twelve times the award of compensatory damages. While the limits the courts place on the size of awards of punitive damages probably should be more definite and predictable than under current law, a mechanical ratio, such as two to one or three to one or four to one or even ten to one would not make good sense. *BMW of North America v. Gore*, —U.S.—, 116 S.Ct. 1589, 1601-02, 134 L.Ed.2d 809 (1996). The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages, which we canvassed in *Kemezy v. Peters*, 79 F.3d 33, 34-35 (7th Cir. 1996)....

The conflict between the Supreme Court of Illinois and the Seventh Circuit is a significant one. Although downplayed by Local 150 at page 9 by failing to dispute the bases for awarding significant punitive damages in small damage cases, the clear disagreement between the two courts lies in their view on how deterrence is accommodated or may be meted out by the Constitution.

Where the Seventh Circuit shows that the Constitution accommodates deterrence by increasing punitive damages to address the deterrence, the effect of wealth, and access to counsel, the Supreme Court of Illinois shows deterrence succumbs to the mechanical ratio disputing how the issues above should be addressed. 39a.

Local 150's Response further fails to apply the *Mathias* standards. If it had, it could not deny that significant federal questions warrant granting the writ. "[L]litigants should not have to face something akin to medieval trial by combat to resolve a basic business dispute. The mounting costs of this drawn-out, no-holds-barred litigation might have forced many a small business to accept an undervalued settlement or to abandon its claims altogether. Indeed, the case history here strongly implies that [the defendant] had exactly that outcome in mind." *CGB Occupational Therapy, Inc.*, 499 F.3d at 194. "[A] substantial punitive damages award is warranted to prevent [the defendant] from gaining the unfair advantage of a reputation for bleeding legal adversaries to death before they can vindicate their rights. *Mathias*, 347 F.3d at 677." *Id.* at 195.

Third, the Fourteenth Amendment does not establish a numerical ratio for achieving a violation of due process. No number is anywhere present in the Fourteenth Amendment to fixate upon as it exists in other places in the Constitution. This Court has rejected "the notion that the constitutional line is marked by a simple mathematical formula." *Gore*, 517 U.S. at 582.

2. *A Numerical Ratio Cannot be Applied to Reputational Torts.*

Lowe submits that the existence of a numerical ratio cannot apply to dignitary torts where damages are not measurable. In *Casey*, *supra* at 920, "The compensatory damages were low here in part because of the inherent difficulties of fixing a dollar equivalent for subjective injuries such as fright and pain. An award of punitive damages proportioned to the low compensatory damages that were awarded would have a very meager deterrent effect, would fail to signal to

the prison authorities that savage treatment of prisoners will not be tolerated, and would not be commensurate with the moral gravity of the defendant's actions."

Local 150 misreads the Illinois Supreme Court's decision at page 16 in observing that Lowe's harm was economic, 17a. But, the erroneous comparison of malicious libel actually made by the Illinois Supreme Court with "a physical or emotional injury" or injuries "of a personal nature" was not comparable. Lowe's corporate injury was greater then these. It was reputational, of "moral gravity." Lowe had to prove its case by a "clear and convincing evidentiary standard" under *Linn, supra,* and not under the much lower majority evidence standard of proof in the cases the Supreme Court of Illinois reviewed. Lowe's proof of injury is even more egregious in these circumstances.[3]

This is furthermore an important distinction for considering how any small plaintiff can be compensated. Lowe is a corporation and "not capable of mental suffering, which ordinarily will be an important component of an individual's damage award for libel. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 540 (7th Cir.1982). Although a corporation is not capable of mental suffering, it is of course still entitled to be compensated for damage to its reputation." *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1139 (7th Cir. 1987).

Reputational injury is critical here and can happen to any person. Because of its historical protection by

[3]Local 150 sets forth the Illinois Supreme Court's factual error on page 18 that Lowe "temporarily lost only one customer, Famco." *See* 18a. The Court found, however, that Lowe lost all regular FAMCO work for "some four to six years," 17a.

the courts, the tort has always been accompanied by significant punitive damages, because "compensatory damages would not do the trick." *Mathias*, 347 F.3d at 647.

The importance of the question here is not just that Lowe is a small business and incurred a withering financial obligation to restore its reputation, it is that a modest company cannot fight a strategy by a wealthy opponent to avoid liability by making litigation very costly through protraction of the legal process. Br. at 18. Therefore, deterrence in the form of punitive damages has to be high in these cases to prevent others from doing this again to Lowe and to other potential victims in the future.

This Court has long adhered to this understanding. In *Day v. Woodworth*, 54 U.S. 363, 371 (1851), the Court understood that the purpose of punitive damages was to punish where harm was non-economic or difficult to quantify. It noted that "[i]n many civil actions, such as *libel*, *slander*, deduction, & c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive, rather than compensatory." [Emphasis added].

Local 150's final point at 23 that Lowe seeks a small damages exception to substitute for "its failure to prove a significant economic injury" is not what Lowe seeks at all and demonstrates Lowe's inability to achieve deterrence based on a numerical limit on punitive damages where economic damages are small in cases involving dignitary harms.

II.
WHETHER THE STANDARD OF REVIEW FOR TRIAL JUDGE AWARDS SHALL BE REVIEWED FOR ABUSE OF DISCRETION REMAINS A SIGNIFICANT AND IMPORTANT QUESTION TO RESOLVE

Lowe's Petition showed that the findings of a trial judge on the need for punitive damages and his application of the elements for formulating a punitive damage award in order to apply the necessary deterrence, should not be reviewed under the same standard applied to a jury.

Local 150 agrees with the Illinois Supreme Court that the standard of review should be *de novo*, as urged on pages 10 and 11 of the Response, without considering the important context in which the two triers of fact and the appellate courts have considered bench trial appeals. It does not deny that the issue raised in the Petition is a significant one. It also does not dispute why there should be a different standard of review for excessive awards from trial judges under this Court's post-*Gore* decision in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (abuse of discretion on review of state court awards).

Local 150 further misstates application of this Court's holding in *Cooper Ind., Inc. v. Letterman Tool Gp., Inc.*, 532 U.S. 424 (2001), on page 13, that this Court "expressly considered and rejected the notion that level of punitive damages was a question of fact to be determined by the jury." Here, the matter was determined by a judge on both the law and the facts. The specific Question Presented here on the existence of a differing standard of review was not decided in that case.

The deterrent factor arrived at by trial judges in setting punitive damages should be reviewed for abuse of discretion or manifest injustice as a fact since the court heard and credited witnesses, observed the transgressions that occurred, witnessed the protraction of the litigation, and fashioned an award of punitive damages necessary to deter a defendant's violations based on legal standards set forth in a written decision that can be competently reviewed. *See Cooper*, 532 U.S. at 437. With these standards addressed by the trial judge, the appellate court maintains its awareness of the gross size or disparity of awards within its jurisdiction, but cannot measure the deterrence needed to prevent the defendant's tortious behavior because it did not evaluate witness credibility and/or remorse as the trial judge does.

Similarly, on page 13 of its Reply, Local 150 adds that the twin purposes for retribution and deterrence behind punitive damages do not involve factual determinations. That is contrary to the Court's observations in *Cooper*, 532 U.S. at 435, that there are "factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous."[4]

The prospect of an abrupt limitation on punitive damages by a medley of courts attempting to resolve the Fourteenth Amendment in different ways cannot be ignored. The Illinois Supreme Court's decision promotes this fundamental conflict in the law.

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[4]The Union was not found negligent as claimed in footnote 3 on page 20 that the Appellate Court for making false picket signs are erroneous or by the Supreme Court. 29a & 30a.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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